FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

81-2057

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

---

JURISDICTIONAL STATEMENT

LEON J. SOKOL
GREENSTONE & SOKOL
39 Hudson Street
Hackensack, New Jersey 08618
(201) 488-3930
Attorney for Appellant Carmen A. Orechio, President, New Jersey Senate

LAWRENCE T. MARINARI
MARINARI & FARKAS, P.C.
1901 N. Olden Avenue 08618
(609) 771-8080
Attorney for Appellant Alan J. Karcher, Speaker, New Jersey Assembly

KENNETH J. GUIDO, Jr.*
HARRY R. SACHSE
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 - 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

CLIVE S. CUMMIS
CHARLES J. WALSH
JERALD D. BARANOFF
SILLS, BECK, CUMMIS, ZUCKERMAN, RADIN & TISCHMAN, P.A.
33 Washington Street
Newark, New Jersey 07102
(201) 643-3232
Attorneys for Appellants James J. Florio, et al

* Counsel of Record

May 6, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the legislatively enacted congressional reapportionment plan with districts which deviate from population equality by less than the statistical imprecision of the census is constitutional.

2. Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, Frank J. Guarini, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the district court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, Millicent H. Fenwick, Harold C. Hollenbeck, James A. Courter, Margaret S. Roukema, and Christopher H. Smith, Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, and C. Joseph Lillo were plaintiffs in the proceedings in the district court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the district court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	5
1. The District Court's Decision Would Require That Most Reapportionment Plans Based on the 1980 Census be Held Unconstitutional	5
2. The District Court Erred in Striking Down a Legislative Reapportionment Plan Which Had Population Deviations Within the Statistical Imprecision of the Census	7
3. The District Court Erred in Concluding that Preventing the Dilution of Minority Voting Strength Does not Justify the Deviations in P.L. 1982, c.1	11
CONCLUSION	15
APPENDIX A	1a
APPENDIX B	30a
APPENDIX C	34a
APPENDIX D	36a
APPENDIX E	42a
APPENDIX F	43a

TABLE OF AUTHORITIES

CASES: Page

Baker v. *Carr*, 369 U.S. 186 (1962) 5
Carstens v. *Lamm*, Civ. No. 81-F-1713 (D.Colo., Jan. 26, 1982) 14
Connor v. *Finch*, 431 U.S. 407 (1977) 7
Doulin v. *White*, No. LR-C-81-418 (D. Ark., Feb. 25, 1982) 6, 11
Drum v. *Scott*, 337 F. Supp. 588 (M.D.N.C. 1972) 6
Gaffney v. *Cummings*, 412 U.S. 735 (1973) 9
In re Illinois Congressional District Reapportionment Cases, No. 81 C 3915 (N.D. Ill., 1981) aff'd *sub nom. Ryan* v. *Otto*, 50 U.S.L.W. 3546 (U.S., Jan. 11, 1982) 11, 14
Karcher v. *Daggett*, A-783 (Brennan, Circuit Justice, March 15, 1982) 10-11
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 4, 6-11
Maryland Citizens Committee for Fair Congressional Redistricting v. *Tawes*, 253 F. Supp. 731 (D. Md.) aff'd *sub nom. Alton* v. *Tawes*, 384 U.S. (1966) 6
Preisler v. *Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D. Mo.) aff'd *sub nom. Danforth* v. *Preisler*, 407 U.S. 901 (1972) 6
Skolnick v. *State Electoral Board of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971) 6
United Jewish Organizations v. *Carey*, 450 U.S. 144 (1977) 14
West Virginia Civil Liberties Union v. *Rockefeller*, 336 F. Supp. 395 (S.D. W.Va. 1972) 6, 10
White v. *Weiser*, 412 U.S. 783 (1973) 4, 7-11

CONSTITUTIONAL PROVISIONS:

United States Constitution, Art. I, Sec. 2 1-3

FEDERAL STATUTORY PROVISIONS:

28 U.S.C. 1253 ..... 2, 5
28 U.S.C. 2284(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ———

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

---

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court, App. A, *infra*, is not yet reported.

JURISDICTION

Plaintiff-appellees brought these actions in the United States District Court for the District of New Jersey to enjoin the New Jersey Congressional reapportionment, P.L. 1982, c.1, as a violation of Article 1, Section 2 of the United States Constitution. The cases were consolidated and a three-judge court was properly convened

pursuant to 28 U.S.C. 2284(a). On March 8, 1982 the three-judge court entered a judgment declaring P.L. 1982, c.1 unconstitutional and enjoining the State appellees from implementing it. App.B, *infra*. Appellants, who were intervenors below, filed a notice of appeal in the district court on March 8, 1982. App. C, *infra*. On March 15, 1982, Justice Brennan stayed the judgment pending final determination of this appeal. App. D, *infra*. This Court denied alternative motions to vacate the stay or expedite the proceedings on March 29, 1982, App. E, *infra*, and Justice Brennan denied a motion to modify the stay on April 13, 1982. App. F, *infra*.

The jurisdiction of this court is conferred by 28 U.S.C. 1253.

CONSTITIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within

three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

The New Jersey reapportionment statute, New Jersey P.L. 1982, c.1, is lengthy. It is set forth as an appendix to the district court's opinion. App. A, *infra*, at 15a-20a.

STATEMENT OF THE CASE

On January 19, 1982, New Jersey enacted a reapportionment plan for the election of United States Representatives, P.L. 1982, c.1. That plan, based on the 1980 decennial census data reduced the number of congressional districts from fifteen to fourteen. App. A, 4a-5a. The districts have an average census population deviation of 0.135% and a maximum deviation between the smallest and the largest districts of 0.6984%. *See* App. A, 5a.

The primary legislative criteria for reapportionment was numerical equality. The leadership agreed that no plan would be considered with maximum deviations over one percent and that smaller deviations would be sought. App. A, 6a. The maximum deviations of the resulting

plan are within the margin of error of the 1980 census. Additional legislative criteria were to protect minority voting strength, and to preserve municipal boundaries.

Plaintiff-appellees, on February 2 and 9, 1982 brought these actions against the State appellees to declare P.L. 1982, c.1, unconstitutional and enjoin its use. The cases were consolidated, appellants were permitted to intervene as defendants, and the case was submitted on depositions, affidavits and exhibits without a trial. On March 3, 1982 the three-judge district court, by a divided vote, declared P.L. 1982, c.1, unconstitutional. App. A, *infra*, Judgment was entered on March 8, 1982. App. B, *infra*.

The district court read *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1973) as requiring any legislatively drafted congressional redistricting plan to be held unconstitutional if it is possible that a plan with a smaller census population deviation could be developed. The court concluded that such a possibility existed in this case because the legislature and the district court had before them plans with smaller census population deviations. The court did not consider the problems with the plans rejected by the legislature. The court concluded that even if preventing dilution of minority voting strength was a legitimate consideration justifying population deviation, it did not do so in this case because the district with the largest black population (District 10) was not one of those with the highest deviation. App. A, 9a. Finally, the district court rejected appellants' argument that the "as nearly as practicable" standard of *Kirkpatrick* is satisfied when the population deviation is less than the statistical imprecision of the census. The court enjoined the State officials from holding any election under P.L. 1982, c.1, gave the legislature until March 22, 1982 to enact a new plan for reapportionment, and stated that if it did not "this Court will convene on March 26, 1982 to undertake further proceedings." App. A, 32a.

Circuit Judge Gibbons dissented. He held that where the deviation between districts is less than the recognized statistical imprecision in the census, a good faith effort to achieve population equality has been shown as a matter of law:

> [T]he only relevant constitutional consideration, in the absence of a much needed federal statute imposing standards for congressional districting, is the achievement of equal representation for more or less equal numbers of persons. A deviation in population between the largest and the smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census. I would hold that achievement of that small a deviation demonstrates as a matter of law a good faith effort to achieve equal member districts. App. A, *infra*, Gibbons, J., dissenting.

Justice Brennan stayed the district court judgment on March 15, 1982. This Court denied motions to lift the stay, or in the alternative to expedite the proceedings on March 29, 1982, and Justice Brennan denied a motion to modify the stay on April 13, 1982. Appellants now appeal to this Court pursuant to 28 U.S.C. 1253.

THE QUESTIONS ARE SUBSTANTIAL

1. The District Court's Decision Would Require That Most Reapportionment Plans Based on the 1980 Census be Held Unconstitutional.

Since *Baker* v. *Carr*, 369 U.S. 186 (1962), federal courts have reviewed numerous congressional reapportionment plans. In many cases the courts have been required to fashion a remedy because the legislature failed to enact a constitutional plan. In none of these cases has a court invalidated a plan with census population deviations as insignificant as P.L. 1982, c.1. Indeed, legislatively approved redistricting plans with larger census

population deviations have been specifically upheld.[1] Also many courts have implemented court ordered plans with deviations well in excess of the deviations in this case.[2] Significantly, the redistricting plan eventually approved after this Court's decision in *Kirkpatrick* v. *Preisler*, *supra*, contained a maximum deviation of 0.629%—in essence the same deviation as declared unconstitutional by the district court in this case.[3]

Moreover, the district court's approach would invalidate most of the congressional reapportionment plans thus far adopted as a result of the 1982 census. At least seven states have reapportionment plans with a census population deviation larger than P.L. 1982, c.1.[4] Another six have deviations in the range of P.L. 1982, c.1 and larger than some of the alternative plans relied upon by the district court.[5] With today's computer technology it is possible, by ignoring all factors other than population equality, to construct congressional districts exactly equal in census population. Thus the ultimate consequence of the rule adopted by the district court is that any plan

---

[1] *See, e.g., Drum* v. *Scott*, 337 F. Supp. 588 (M.D.N.C. 1972); *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395 (S.D.W. Va. 1972).

[2] *Doulin* v. *White*, No. LR-C-81-418 (D. Ark. Feb. 25, 1982); *Skolnick* v. *State Electoral Board of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971); *Maryland Citizens Committee for Fair Congressional Redistricting, Inc.* v. *Tawes*, 253 F. Supp. 731 (D. Md.) aff'd *sub nom. Alton* v. *Tawes*, 384 U.S. 315 (1966).

[3] *Preisler* v. *Secretary of State of Missouri*, 341 F. Supp. 1158 (W.D. Mo.) aff'd *sub nom. Danforth* v. *Preisler*, 407 U.S. 901 (1972).

[4] Alabama (2.460%); Georgia (.889%); Indiana (3.095%); Massachusetts (.902%); Tennessee (2.440%); Virginia (1.81%); and West Virginia (2.579%).

[5] Louisiana (.42%); Nebraska (.231%); Nevada (.33%); Oklahoma (.574%); Texas (.30%); and Utah (.43%). The Nevada figure is subject to a forthcoming correction by the Bureau of the Census involving about 1400 people.

which does not come within one person of census population equality is unconstitutional. This would displace legislative policy-making in favor of computer generated plans equal in census population but lacking any other rational policy. And it overlooks the admonition of *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977) (footnote omitted), that:

> "[L]egislative reapportionment is primarily a matter for legislative consideration and determination," [citation omitted] for a State legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial equality.

2. The District Court Erred In Striking Down A Legislative Reapportionment Plan Which Had Population Deviations Within The Statistical Imprecision Of The Census.

The district court in reviewing P.L. 1982, c.1, concluded that alternative congressional reapportionment plans were available with less of a census population deviation. Although the deviations were within the statistical imprecision of the census, the district court concluded that the opinion in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *White* v. *Weiser*, 412 U.S. 783 (1973), required the invalidation of P.L. 1982, c.1.

In reaching its decision, the district court misconstrued this Court's decisions in *Kirkpatrick* and *White*. Moreover, it requires the selection of the plan with the lowest census population deviation over plans which have deviations the functional equivalent of zero.

The deviations in *Kirkpatrick* and *White* were 5.97% and 4.13%, many times the 0.6984% deviation here. Moreover, in *Kirkpatrick* this Court stressed that alternate plans are probative evidence that a population deviation is avoidable where the plans "would have *markedly reduced* population variances among the districts." 394

U.S. at 532 (Emphasis added). And in *White* v. *Weiser*, this Court further clarified the principle of "unavoidability" created in *Kirkpatrick*. The Court found that a plan cannot pass the constitutional test if "the districts were not as mathematically equal as *reasonably* possible." 412 U.S. at 790. (Emphasis added).

In this case the selection of the available alternatives would not have "markedly reduced" the deviations. Nor did the existence of alternatives mean that the districts embodied in P.L. 1982, c.1, were not as "mathematically equal as reasonably possible." The uncontroverted evidence in this case demonstrates that the deviations in P.L. 1982, c.1, because of the statistical imprecision of the census, are the functional equivalent of zero.

As Dr. James Trussell, a demographer at Princeton University, testified:

> [T]he undercount in the 1980 census is likely to be above one percent, once an estimate of the number of the illegal aliens is explicitly included in the demographic equation. . . .
>
> . . . [O]ne cannot make congressional districts of truly equal size if one relies on census counts. Nor is it meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion. (Trussell Statement, Para. 13 & 14, DFLH Ex. 5).[6]

---

[6] Note: The following nomenclature adopted by the district court will be used to refer to exhibits introduced before the district court at the February 25, 1982 hearing:

1. J.Ex. = Affidavits, bills and depositions agreed upon as joint exhibits.
2. PFH = Exhibits introduced at hearing by Plaintiffs Forsythe, *et al.*

[Footnote continued on page 9]

Dr. Trussell also found that because these census undercounts are unevenly distributed both in the United States and within the State of New Jersey, no meaningful adjustments can be made to normalize the data. Trussell Statement Para. 13 & 14, DFLH Ex. 5. Consequently, where a known error of approximately 1% exists, it is futile for courts to suggest that alternative plans, even if unflawed, can result in a "markedly reduced population variance . . ." *Kirkpatrick*, 394 U.S. at 532. *See also, Gaffney* v. *Cummings*, 412 U.S. 735, 745-46 (1973).

Judge Gibbons, in the district court below, agreed that any attempt at precision below the tolerance of the yardstick is an exercise in futility. He observed in his dissent:

> It seems to me, therefore, that the rule must be that variances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts. I would read the *de minimus* [*sic*] language in *Kirkpatrick* v. *Preisler* as a prohibition against toleration of *de minimus* [*sic*] dilutions of relative representation rather than as a prohibition against toleration of *de minimus* [*sic*] population variances which have no statistically relevant effect on relative representation. App. A, *infra*, Gibbons, J., dissenting.

The district court's strict reading of *Kirkpatrick* v. *Preisler, supra* and *White* v. *Weiser, supra*, we believe, is not justified by either their language or the purposes for which the Court fashioned the one-man one-vote prin-

---

[6] [Continued]

3. DFLH = Exhibits introduced at hearing by Defendant-Intervenor Florio *et al.*, Senate President Orechio, New Jersey Senate, and Assembly Speaker Karcher, New Jersey Assembly.

ciple.[7] As Justice Powell observed in *White* v. *Weiser*, 412 U.S. at 798 (concurring opinion):

> [I] would not have thought that the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment.

And as this Court stated in *White* v. *Weiser* "a district court should . . . honor state policies in the context of congressional reapportionment." 412 U.S. at 795. But if, as the court below concluded, the state must inevitably adopt the plan with the least population variance, there would be no room left for state policies of any kind. As Justice Brennan concluded in granting the stay sought by appellants in this case:

> The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey legis-

---

[7] In *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395, 399 (S.D. W.Va. 1972), a three-judge court in reviewing a legislatively enacted plan found that an attempt at precise mathematical precision in redistricting was neither required by *Kirkpatrick* nor was it practical. In approving a plan which presented a relative deviation of 0.78%, the court observed:

> [I]t would be very difficult to markedly reduce the variances in a plan which, in fact, only varies 0.35% above and 0.43% below the mathematical ideal. Additionally, though marked reduction in the variances involved in [the redistricting law] is not possible, the court must recognize that redistricting plans conceivably could be produced which would reduce variances below those contained in any of the proposals thus far presented, but this would be impractical and *Kirkpatrick* does not require it....

The court there recognized that while other plans offered slight reductions in variances, none offered the "marked reductions" referred to in *Kirkpatrick*. 336 F.Supp. at 400.

> lature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision. App. D, *infra*, at 38a.

Justice Brennan's conclusion is reinforced by the fact that other district courts around the nation have considered factors other than census population equality in selecting between plans with insignificant differences in deviations. *Doulin* v. *White*, No. LR-C-81-418 (E.D. Ark., Feb. 15, 1982); *In re Illinois Congressional Districts Reapportionment Cases*, No. 81 C 3915 (N.D. Ill., 1981), aff'd *sub nom. Ryan* v. *Otto*, 50 U.S.L.W. 3546 (U.S. Jan. 11, 1982). Indeed in *Doulin* v. *White*, *supra*, the court, following the "necessary logical implications" (*id.*, Slip Op. at 7) of *White* v. *Weiser*, *supra*, ordered implementation of a plan which had a deviation of 0.78% over alternatives which had deviations ranging from 0.13% to 0.44%.

3. The District Court Erred in Concluding That Preventing the Dilution of Minority Voting Strength Does Not Justify the Deviations in P.L. 1982, c.1.

The district court did not address petitioner's contention that avoiding the dilution of minority voting strength in various congressional districts is, itself, a legitimate constitutional criterion justifying the deviations from precise population equality. Rather, the district court stated that it "need not decide whether this interest is sufficient to justify a deviation from population equality." App. A, *infra*, at 9a. The district court did so because it concluded that there was no exact causal relationship between preserving minority voting strength in the Tenth Congressional District and population variances in other districts.

It is undisputed that the avoidance of the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c.1, as opposed to alternatives proposed to the Legislature.[8] Of particular concern was the Newark-based district which had suffered a substantial population loss since the 1970 census.[9] Consequently, the legislature sought to avoid the present and potential dilution of minority voting strength.[10] As the testimony of the New Jersey black leaders reveals, P.L. 1982, c.1, protects minorities from having their vote diluted better than any of the alternatives presented to the legislature and relied upon by plaintiffs in this action, and was supported by black leaders over any of the alternatives for this reason.[11]

There were before the legislature four plans with smaller census population deviations than P.L. 1982, c.1.[12] Two others, submitted to the legislature after P.L. 1982, c.1 became law, were before the district court.[13] Each of

---

[8] As the deliberations leading to the adoption of P.L. 1982, c.1 reveal, the avoidance of the dilution minority voting strength was a prime objective in the Legislature's consideration of redistricting alternatives. Karcher Deposition, 125, 133-137, J.Ex.3; Jackman Deposition 12-14, 96, 98-99, 123, 131-34, J.Ex.2; Feldman Deposition 13, 29, 32, 40-46, 61, 80, 94, J.Ex.3.

[9] Karcher Deposition 133, J.Ex.3; Karcher Statement, para.3, DFLH Ex.1.

[10] Karcher Deposition 136-137, J.Ex.3.

[11] Gibson Statement, DFLH Ex. 2; Cooke Aff., DFLH Ex. 3; Woodson Aff. DFLH Ex. 4.

[12] The Kavanaugh I Plan, S-3525/A-3776 (0.346%); the DiFrancesco Plan, S-3547 (0.125%); the Hagerdorn Plan, S-3328/A-3646 (0.195%); the Hartwick II Plan, A-3817 (0.451%). Alito to Aff., J.Ex.7, App.A.

[13] Kavanaugh II Plan, A-615 (0.029%); Bennett II Plan, A-614 (0.136%). Op. 7, Alito Aff., J Ex. 7, App. A.

these alternative plans would have diluted minority voting strength and were properly rejected by the legislature. For example, District Ten, which includes the City of Newark, was about 60% black based on the 1970 census. Due to a decline in the proportion of blacks in the area between 1970 and 1980, some decline in the black voting strength in this district was inevitable. Thus, under P.L. 1982, c.1, the district is 54.8% black. Two alternative plans, however, would have reduced the black population below 50%, a dilution of the black voting strength far more extreme than justified by the demographic shifts.[14]

The district court disregarded this uncontradicted testimony because in its view the avoidance of the dilution of minority voting strength did not explain the deviations in all districts. To retrospectively require the legislature to show precisely how preservation of minority voting strength in one district caused the particular population deviations in other districts, as the district court suggested, imposes an impossible burden on the legislature. It is evident that shifts in one district affect the adjacent districts, and indirectly, districts further away. However, to precisely document these effects may be difficult and is not justified when the plan selected better protects minorities than the available alternatives.

The second reason the district court rejected the appellants' argument respecting dilution of minority voting rights was that P.L. 1982, c.1, failed to include Orange, "a city with a high concentration of minority groups" within the Tenth Congressional District.

---

[14] The Kavanaugh I Plan (S-3525/A-3776), would have a District Ten which is only 46.3% black, a full 8.5% less than P.L. 1982, c.1. The Hagerdorn plan (S-3328/A-3646) is even worse; District Ten is only 38.7% black in that plan. Alito Aff., J. Ex. 7, App. B.

It is difficult to see how the district court justifies second-guessing the legislature in this area. Orange itself, though its minority population was not significantly dissimilar in 1970, had been a part of the Eleventh Congressional District in the 1970 reapportionment. To infer from the exclusion of the City of Orange from the Tenth (the inclusion of which would necessitate the removal of a like number of other people, including a large number of blacks) that the legislature did not make a good-faith effort to protect minorities, was inappropriate. It may be that the legislature could have done marginally better in the Tenth for racial minorities, but to do so would have resulted in the adoption of alternatives with other difficulties.

The undisputed record in this case is that the legislature, at all times, sought population equality in drafting P.L. 1982, c.1, in a way that would avoid the dilution of minority voting strength, a constitutionally permissible objective. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 161-162 (1977) (White, Stevens, Brennan and Blackmun, J.), 430 U.S. at 180 (Stewart and Powell, J., concurring). Given the importance of preventing the dilution of minorities' voting strength, other district courts have consciously sought to protect minorities' interests when drawing court-ordered plans. *See, In re Illinois Congressional District Reapportionment Cases*, No. 81 C 3915 (N.D. Ill. 1981), affirmed *sub nom. Ryan* v. *Otto*, 50 U.S.L.W. 3546 (U.S., Jan. 11, 1982); *Carstens* v. *Lamm*, Civ. No. 81-F-1713 (D. Colo., Jan. 26, 1982). Similarly, the legislature was within its constitutional prerogative when it adopted P.L. 1982, c.1, because it protected minority interests better than the handful of alternatives before it with slightly lower census population deviations.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

LEON J. SOKOL
GREENSTONE & SOKOL
39 Hudson Street
Hackensack, New Jersey 08618
(201) 488-3930
Attorney for Appellant
Carmen A. Orechio, President,
New Jersey Senate

LAWRENCE T. MARINARI
MARINARI & FARKAS, P.C.
1901 N. Olden Avenue Ext.
Trenton, N.J. 08618
(609) 771-8080
Attorney for Appellant
Alan J. Karcher, Speaker,
New Jersey Assembly

KENNETH J. GUIDO, Jr.*
HARRY R. SACHSE
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS,
SACHSE & GUIDO
1050 - 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

CLIVE S. CUMMIS
CHARLES J. WALSH
JERALD D. BARANOFF
SILLS, BECK,
CUMMIS, ZUCKERMAN,
RADIN & TISCHMAN, P.A.
33 Washington Street
Newark, New Jersey 07102
(201) 643-3232
Attorneys for Appellants
James J. Florio, et al

* Counsel of Record

May 6, 1982